(1) 061592 2007

No.

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

LTC Donald Sullivan,
Petitioner, *In Pro Per* and *Sui Juris*

V

Carson Smith, individually and in his capacity as Sheriff of Pender County, North Carolina; Major Keith D. Hinkle and Captain Mark Sloan, individually and in their capacities as officers of the Sheriff's Department of Pender County, North Carolina; Deputy E.S. Wyrick, Jr, Deputy Corey Reed, Deputy Sam Gonzales, John Does I-IV; and Jane Doe, individually and in their capacities as officers of the Sheriff's Department of Pender County; Magistrate Delores R Helms, individually and in her capacity as an officer of the court for the Fifth Judicial District of North Carolina,
Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

LTC Donald Sullivan
PO Box 3061
Wilmington, NC 28406
910-617-2559

Questions Presented For Review

Whether or not, under federal constitutional or statutory law; the petitioner any longer possesses that right to a trial by jury and at "common law" as guaranteed and protected by the Seventh Amendment to the Constitution and in the "ancient mode" as guaranteed by the Constitution for the State of North Carolina at Article 1, Section 25?

Whether or not the petitioner has a right to travel on the public way without regulation or restriction as a part of his right to liberty established in the Declaration of Independence and guaranteed in the Constitution of the United States?

Whether or not the petitioner has a right to due process of law as held in the Fourteenth Amendment?

Whether or not the petitioner has a right to counsel of his own choice?

Whether or not the petitioner has a right to petition his government for redress of grievances as held in the First Amendment?

Whether or not the petitioner has the same and equal rights under the 14th Amendment and its enforcing legislation as do all other citizens of the United States?

Whether or not the United States Constitution is applicable or has become obsolete, anachronistic and irrelevant, as opined by the District Court?

Whether or not, under federal constitutional and statutory law, the Respondents should be held accountable for their individual and official violations of constitutional or statutory law against petitioner.

Whether the Federal District Court acted properly in dismissing Petitioner's 42USC, Section 1985 and 1986 claims?

Whether the Federal District Court acted properly in dismissing Petitioner's Motion to Amend his complaint?

Whether the Federal District Court acted properly in dismissing Petitioner's complaint in its entirety?

Whether the 4th Circuit Court of Appeals acted properly in denying Petitioner's appeal of the lower court's dismissal of his case in its entirety?

List of Parties

A full list of the Parties in the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner: Lieutenant Colonel Donald Sullivan, *in propria persona, sui juris*

Respondents: Carson Smith, individually and in his capacity as Sheriff of Pender County, North Carolina; Major Keith D. Hinkle and Captain Mark Sloan, individually and in their capacities as officers of the Sheriff's Department of Pender County, North Carolina; Deputy E.S. Wyrick, Jr, Deputy Corey Reed, Deputy Sam Gonzales, John Does I-IV; and Jane Doe, individually and in their capacities as officers of the Sheriff's Department of Pender County; Magistrate Delores R. Helms, individually and in her capacity as an officer of the court for the Fifth Judicial District of North Carolina.

INDEX TO APPENDICES

APPENDIX A: Order allowing Defendants/Respondent's Motion to dismiss Plaintiff/ Petitioner's 42USC1985 and 1986 claims, granting Respondent Helms' motion to dismiss, and granting dismissal of certain of Plaintiff/Petitioner's official capacity claims under 42USC1983. Judgment from Judge Louise W. Flanagan, Chief District Court Judge of the United States District Court for the Eastern District of North Carolina, dated October 12, 2004.

APPENDIX B: Order denying Plaintiff/Petitioner's Motion to Amend the pleadings, granting Respondent's Motion for Summary Judgment, dismissing all claims of Plaintiff, and Judgment from Judge Louise W. Flanagan, Chief District Court Judge of the United States District Court for the Eastern District of North Carolina, dated March 28, 2006.

APPENDIX C Judgment affirming decision of the District Court from Judges NIEMEYER, WILLIAMS, and KING, United States Court of Appeals for the Fourth Circuit, dated December 28, 2006

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth District appears at Appendix C to the petition and is unpublished.

The opinions of the United States District Court for the Eastern District of North Carolina appear at Appendices A and B, and are unpublished.

JURISDICTION

Petitioner grants special, and not general, jurisdiction to the Court for the hearing of this petition for writ of certiorari. The date on which the United States Court of Appeals rendered judgment in this case was December 28, 2006. No Petition for rehearing was timely filed in this case. The statutory and constitutional jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and Article III, United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 25, Constitution for the State of North Carolina: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."

Amendments to the United States Constitution

Article I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article IV: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, ..."

Article V: "No person shall be ... deprived of life, liberty, or property, without due process of law; ..."

Article VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ..."

Article XIV: "No State shall ... enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person ... the equal protection of the laws."

STATEMENT OF THE CASE

In this action, Plaintiff/ Petitioner, LTC Donald Sullivan, seeks damages for violations of his constitutional and civil rights under 42 U.S.C., Sections 1983, 1985 and 1986, and for common law assault and battery, false imprisonment, malicious prosecution, intentional infliction of emotional distress, defamation and gross negligence, in connection with an arrest. By order of October 12, 2004, on motion by Pender County Defendants/Respondents, the lower court dismissed all claims against Pender County and Helms, the Section 1985 and 1986 claims against all the individual defendants, and the official capacity claims against the individual defendants, excluding Defendant/Respondent Smith. The remaining Defendants/Respondents filed a motion for summary judgment as to all claims of Plaintiff/ Petitioner on July 1, 2005. Plaintiff/ Petitioner filed a motion to amend the pleadings to more completely identify Defendants Doe I-IV and Jane Doe, and to add a phrase, "and the right to liberty, including, but not limited to, his right to travel", to three paragraphs of his complaint on September 16, 2005.

On March 28, 2006, the lower court issued an order denying Plaintiff/ Petitioner's motion to amend his complaint, granting the Defendants/Respondents' motion for summary judgment, and dismissing all claims raised by Plaintiff/ Petitioner. Plaintiff/ Petitioner timely appealed said order dismissing his complaint in its entirety on April 21, 2006. The Fourth Circuit Court of Appeals affirmed the ruling of the lower court on December 28, 2006.

Whereas, Plaintiff/Petitioner has complained in his pleadings that his unalienable rights to liberty and the pursuit of happiness were violated by the Defendants/Respondents; that they also denied his constitutionally guaranteed rights to be secure against unreasonable searches and seizures (Amendment IV); to liberty (including, but not limited to, the right to travel) and property (Amendment V); and to liberty, property, due process, and equal treatment under the law (Amendment XIV);

1

Whereas, he has further averred in his appeals that the court, through judicial fiat, is denying his rights to petition the Government for a redress of grievances (Amendment I) and to trial by jury (Amendment VII) in the ancient mode (Article I, Section 25, Constitution for the State of North Carolina). Petitioner not only timely demanded said right to trial by jury in his original complaint, he reiterated that demand in his numerous filings with the lower court and specifically enumerated it in his appeal;

Whereas, it is true these several enumerated denials of rights are included in this petition by the Petitioner, the denial of that most sacred constitutionally guaranteed right of trial by jury was administered by the court, and is the focal point of this petition. Without this right, and the right to bear arms in protection of this right, government can only slip into tyranny, and the rights of the people be extinguished. Therefore, Petitioner presents, *infra*, his demand that his right to trial by jury on all this claims so triable, a right so easily abolished by the lower court, be
re-instated by this supreme Court of the united States;

Whereas, in this instant matter, the tyranny of the judiciary, if not the ignorance of it, has denied Petitioner his constitutionally guaranteed right to trial by jury, using
rules, legislation and precedent to defend that denial, as seen below, this is not as it was meant to be:

> "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." *Miranda v Arizona*, 384 U.S. 436, p 491;

Whereas, this Court and others have sustained the rights of the people from inappropriate actions by government against those rights:

> "The State cannot diminish the rights of the people." *Hurtado v California*, 110 U.S. 516
> A law that improperly infringes on constitutional rights is void from its inception and no person can be obligated to obey such a law. 16A AmJur2d Constitutional Law, §203 (1998).
> "The court is to protect against any encroachment of constitutionally secured liberties." *Boyd v. U.S.*, 116 U.S. 616

"An unconstitutional act is not law; it confers no rights; it imposes no duties; affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425

"Waivers of constitutional rights, not only must they be voluntary, they must be knowingly intelligent acts done with sufficient awareness." *Brady v. U.S.*, 397 U.S. 742, 748;

Whereas, it is the role of the jury to protect the individual from the tyranny of laws and the tyranny of government which makes and enforces the laws, without such protection no man's rights are secure. One juror can stop tyranny with his vote. He can nullify bad law in any case. While the judiciary is "bound by the statute", hemmed in by "precedent" and limited by license and privilege, the jury is only limited by its ignorance. Where judges have been misled to believe that a jury can only rule on the evidence, history and fact tend toward the broader view, that:

"The jury in all criminal cases, shall be the judges of the law and the facts." – Georgia, Declaration of Rights, Art.I, Sec.II, Para. I

"The jury has the right to judge both the law as well as the fact in controversy." John Jay, First Chief Justice of the supreme Court, 1789

"The jury has the right to determine both the law and the facts." Samuel Chase, US supreme Court Justice, 1796, signer of the unanimous Declaration.

"The jury has the power to bring a verdict in the teeth of both law and fact" Oliver Wendell Holmes, US supreme Court Justice, 1902

"The law itself is on trial quite as much as the cause which is to be tried." Harlan F. Stone, 12th Chief Justice of he supreme Court, 1941

"The pages of history shine on instances of the jury's exercise of its prerogative to disregard instructions of the judge...The jury has an unreviewable and unreversible power...to acquit in disregard of the instructions on the law given by a trial judge..." *US v. Dougherty*, 473 F 2nd 1113, 1130, 1139 (1972);

Whereas, by its pre-emptive dismissal of Petitioner's complaint, the court disregarded his right to have a jury assess not only the facts of this case, but also the relevance and application of the law by the Respondents, justice was denied. This judicial tyranny is in large part responsible for the opinion among the citizenry today that the judiciary is unreliable at best, and totally

corrupt at worst. It is the power of an informed and available jury upon which the liberty of this country is founded. Without it, there are no "chains of the Constitution" binding the government, and there is no guarantee of security, freedom or liberty to the people.

In its first charge to the jury in the February term of 1794, the US supreme Court illustrated the power of the jury:

> "...it is presumed, that the juries are the best judges of the facts; it is, on the other hand, presumed that the courts are the best judges of law. But still both objects are within your power of decision...You have a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." *State of Georgia v. Brailsford, et al*, 3 Dall. 1;

Whereas, unchecked power is the foundation of tyranny. Continuance of the judiciary's reliance, nay imposition, of pre-emptive dismissals and denials for "violations or rules", of "plea bargains", of court-induced "settlements" and "mediations", etc., albeit a marvelous method of reducing the docket load (The clerk of the Court of Appeals for NC has told this petitioner point-blank that the purpose of the Appellate Rules of Procedure is to limit the number of cases on the docket. It is not about justice or fairness, it is about workload.), this is absolute tyranny, designed to make the bureaucracy more comfortable, not to protect individual liberty and foster justice. It enhances "privilege" not rights, has only eroded the rights of the people to justice and to a jury, such that it is now assumed that no jury will be allowed, nor is a jury warranted. While a jury may judge the spirit, motive and intent of both the law and the accused, the judiciary (which includes not only the prosecutor and the judge, but all the other minions present in the legal system) only represents the letter of the law. The people are entitled to all their defenses against such tyranny, but the judge doesn't allow them to get there.

For example, in an earlier case, Petitioner was told by a Senior District Court Judge that "the Constitution has been overwhelmed by events and by time". The judge then proceeded to quote examples for the record of how the Constitution is "no longer relevant" before denying a request for TRO and later dismissing the entire complaint. In another case, the State court, after admitting

the merits of Petitioner's arguments, stated he was not the judge for that decision and dismissed the matter. No jury, no trial: No rights.

With the judges carefully paring down what the litigant may present to the jury, what arguments he may use, what witnesses he may question, denying the accused to be present or represented at "meaningful" hearings such as the grand jury, and then charging the juries in such a way as to bias their verdicts, there can be no more fair trial, with or without the jury present. But, at least if the litigant is assured he will get to a jury and will be able to present unfettered opening and closing arguments, the façade of "justice" can be maintained by the judiciary.

Therefore, this pattern of behavior must be stemmed before it succeeds in undermining the people's rights to life, liberty and pursuit of happiness and ultimately destroying this country, starting with this instant matter now being presented to the Court. Or, as prophesied by Founder Thomas Jefferson:

> "Our rulers will become corrupt, our People careless. The time for fixing every essential right on a legal basis is while our rulers are honest and ourselves united. From the conclusion of this war, we shall be going downhill. It will not then be necessary to resort every moment to the People for support. They will be forgotten, therefore, and their rights disregarded. They will forget themselves, but in the sole faculty of making money, and will never think of uniting to effect a due respect for their rights. The shackles, therefore, which will not be knocked off at the conclusion of the war, will remain on as long, will be made heavier and heavier, til our rights shall revive or expire in a convulsion...We will be taxed for fifteen-sixteenths of our product, and we will pay the wages of those who place the shackles on our hands and feet." ("COMMENTS AND NOTES TO THE STATE OF VIRGINIA,", QUORY 17, PAGE 10, 1784.)

REASONS FOR GRANTING THE PETITION

The United States Government, represented by the Judicial Branch, has departed so far from the stated intent, the origin, and the letter of the United States Constitution in the area of the guaranteed rights of the individual to a trial by jury as to call for an exercise of the Court's judicial review authority.

The federal District Court and the United States Court of Appeals for the Fourth District have erroneously decided an important question of federal constitutional law, that of Right toTrial by Jury, that should be settled by this Court.

The United States District Court for North Carolina, Southern District, and the United States Court of Appeals for the Fourth District have erroneously dismissed Petitioner's Complaints against the Respondents on contrived and unfounded issues of justiciability, through unconstitutional rulemaking and legislation designed to deny Petitioner, and virtually any complainant, his constitutional and civil rights by judicially eliminating his right to a trial by jury.

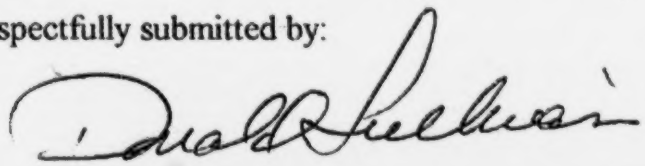
All of the Defendants/Respondents, the members of the lower courts and the members of this supreme Court have sworn "to support and defend the Constitution of the United States against all enemies, foreign and domestic", or words to that effect. To deny this petition is to deny all citizens their right to trial by jury on the facts and the law, and is a violation of that sacred oath by the "deniers".

CONCLUSION

By the arguments herein presented, and for the preservation of constitutional liberty, this Petition for a writ of certiorari should be granted, the merits of Petitioners' Case should be reviewed by this Court for reversal of the Fourth Circuit's dismissal of his appeal, and the case be remanded in its entirety to the District Court to be tried before a duly established jury in the "Ancient Mode"; or, in the alternative, oral arguments should be heard, and this petition tried before the Supreme Court of the United States as matters of the constitutional integrity of the United States Judiciary are at stake.

Petitioner requests any action on this petition for writ of certiorari be accompanied by a full and complete explanation of findings of fact and conclusions of law for said action. Failure by this Court to provide said remedy is tantamount to its admission that the Republic has been replaced by coup with a judicial oligarchy no longer answerable to the people. The ultimate result of such failure is either for the people to default to paragraph 2 of the unanimous Declaration where it has become necessary to "abolish" that form of government, or to accept their being reduced to a status of slavery to that government as it exists.

Respectfully submitted by:



Donald Sullivan, Petitioner, *In Pro Per* and *Sui Juris*
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Date: March 26, 2007

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:04-CV-26 FL(1)

LTC Donald Sullivan, Plaintiff, Pro Se, v. COUNTY OF PENDER, NORTH CAROLINA, et al, Defendants	FILED 10/12/04 MICHAEL D. BROOKS, ACTING CLERK US DISTRICT COURT, EDNC **ORDER**

This matter comes before the court on a motion to dismiss part of plaintiff's complaint by defendants Pender County, Carson Smith, Keith D. Hinkle, Mark Sloan, E.S. Wyrick, Jr., Corey Reed, Sam Gonzales, and Does I-IV (collectively, "the Pender County defendants") (DE #6), and on a motion to dismiss, and a motion to deem motion to dismiss timely filed, by defendant Dolores Helms. (DE #12). Plaintiff has responded, and in this posture the matter is ripe for ruling. For the reasons that follow, the motions will be granted.

I. STATEMENT OF THE CASE

In this action, plaintiff LTC Donald Sullivan seeks damages for violations of his constitutional and civil rights under 42 U.S.C. §§ 1983, 1985, and 1986, and for common law assault and battery, false imprisonment, malicious prosecution, intentional infliction of emotional distress, defamation and gross negligence, in connection with an arrest. In their motion, the Pender County defendants move to dismiss all claims against Pender County, the § 1985 and § 1986 claims against the individual defendants, and the official capacity claims against the individual defendants, excluding defendant

Smith, in her motion to dismiss, defendant Helms moves to dismiss all claims against her on grounds, *inter alia*, of judicial immunity, and she seeks to have the court deem her motion timely filed.

II. FACTUAL BACKGROUND

The allegations in plaintiff s complaint may be summarized as follows. At all times relevant to this case, plaintiff was a fifty-five year old, white, male, retired Lieutenant Colonel, landowner, and resident of Pender County, North Carolina. Defendant Smith was the Sheriff, and defendants Hinkle, Sloan, Reed, Gonzales, Wyrick, Doe I-N, were officers or deputies in the Pender County Sheriffs Department (hereinafter "department"). Defendant Helms was a Magistrate in Pender County.

Over the course of several years plaintiff had various contacts and communications with the department. In 1999, plaintiff communicated with members of the department concerning land use on his property and issues relating to access through his property. Around this time, plaintiff also made a complaint to the department concerning an allegedly unlawful confiscation of his personal weapon.

In December 2002, plaintiff met with defendant Sloan to discuss the department's investigation into his weapon complaint. Also at that meeting, defendant Sloan advised plaintiff that the department had received an anonymous tip that plaintiff did not have a valid driver's license. IDefendants Gonzales and Wyrick have withdrawn a motion to dismiss on grounds of improper service.] Plaintiff confirmed that he did not have a North Carolina driver's license, but showed defendant Sloan that he had a license for the state of Montana, valid until 2006.

In January 2003, plaintiff heard through an unidentified source that the department was trying to "get something on him" and was aware of "the driver's license issue." (Compl., ~25). Plaintiff hand-delivered a letter addressing the issues raised by the unidentified source to the Sheriff, defendant Smith. Plaintiff met with defendant Smith, who read plaintiff's letter in his presence.

Plaintiff confirmed with defendant Smith that he did not wish to obtain a North Carolina driver's license because the "NCDMV" was prone to putting private information on the Internet or selling it. (Compl., ~ 26).

At 2:00 p.m. on Aprill9, 2003, plaintiff was erecting a gate on his property at "Saps Road," in Hampstead, a town in Pender County. (Compl., ~27). The gate spanned the entrance to an access road to an alleged easement over plaintiffs property. Plaintiff had given the owner of the alleged easement a key to the gate. Defendant Reed arrived at the scene and told plaintiff that he could not put up the gate to restrict access to the alleged easement. After some discussion, plaintiff informed defendant Reed that he would not lock the gate until the next day.

At 5:30 p.m. that same day, defendant Sloan interviewed two individuals at a residence on the same road as plaintiffs property, in order to ascertain plaintiffs whereabouts. At around 7:00 p.m. that same day, plaintiff parked his car at a gas station in Hampstead, and was in the process of pumping gasoline. Defendants were aware that plaintiff was in Hampstead, and plaintiffs car was readily identifiable by defendants. A department patrol car pulled into the gas station lot, then pulled . away. Several minutes later, three department patrol cars pulled into the gas station lot directly behind plaintiff's car. Defendant Reed exited the first car, defendant Wyrick exited the second, and defendant Gonzales exited the third.

Defendant Reed first inquired of plaintiff whether he had finished erecting his gate. Plaintiff responded that his gate was erected, but not locked. When plaintiff asked what was going on, defendant Reed responded that they would let him know. Defendant Wyrick asked to see plaintiff's driver's license. Plaintiff again asked what was going on, and defendant Gonzales "demanded he show the license, or else." (Compl., ~ 30). Plaintiff asked to be able to pay for his gas and move his vehicle away from the gas pumps. Defendant Gonzales informed plaintiff that they would take care of paying for the gas, and again asked plaintiff for his license.

Plaintiff then moved towards the interior of his car, stating

that his license was located in a briefcase on the rear seat. Plaintiff retrieved a laminated license with an expired date from his briefcase, and also offered an "official update slip for the license to defendant Gonzales showing the license had been renewed." (Compl., ~ 31). Defendant Gonzales responded "I don't need to see that. This (the laminated license) is all I need." (Id.). Defendant Gonzales also saw and retrieved a weapon on the front seat of plaintiff's car.

Plaintiff was then searched and handcuffed tightly behind his back, so that the cuffs were painfully cutting into his wrists. Defendant Gonzales stated, "this license has been permanently revoked," to which plaintiff responded "that's news to me." (Compl., ~ 32). Plaintiff's car was searched thoroughly, a wrecker was called to impound the car, and plaintiff's weapon, briefcase, and a "cashier's check" in the car were seized. (Compl., ~ 38).

. Plaintiff was taken to Wyrick's patrol car, where Wyrick asked him some background questions. Although plaintiff had renewal paperwork for his expired license, defendant Gonzales and Wyrick did not want to look at plaintiff s paperwork or to "run the license" at the scene. Instead Gonzales and Wyrick referred to a previously-prepared" 1 0-27 report" referencing the name "Donald Raymond Sullivan." (Compl., ~ 35). Plaintiff informed defendant Wyrick that his name was not Donald Raymond Sullivan, and stated "you have my license. You figure it out." (Compl., ~ 36). Defendant Wyrick contacted his dispatch, defendant Doe ill, to verify plaintiffs name and determined that there was a discrepancy between the name on the 10-27 report and the name on the license. Defendant Wyrick also confirmed that the person referred to on the 10-27 report as Donald Raymond Sullivan was not plaintiff.

Defendant Wyrick asked for plaintiffs social security number and place of birth, which plaintiff refused to give. Plaintiff instead asked "what would he put down if it were an illegal immigrant Mexican in the car," to which Wyrick responded he would leave it blank. (Compl., ~37). Defendant Wyrick obtained a physical address from plaintiff, which plaintiff discovered later was made a matter of public record.

After "at least two hours" from the commencement of the

stop, defendant Wyrick eventually began driving away from the gas station with plaintiff in the patrol car. (Compl., ~ 39). At one point, he abruptly pulled the car over and read plaintiff "his rights." (rd.). Plaintiff asked defendant Wyrick why they had stopped him, to which Wyrick responded "because I saw you driving." (Id.).

Defendant Wyrick drove plaintiff to the Surf City Police Station, where he was placed in a holding cell. He was then brought before defendant Magistrate Helms, who charged plaintiff criminally. Plaintiff was placed under a $1500 cash bond, although defendant Helms also told plaintiff that he could use a deed for bail once he had been registered at the jail. Defendant Helms volunteered that she was familiar with plaintiff s "stands against his neighbors and the government agencies." (Compl., -42). All of the officers present also knew of plaintiffs reputation "as a property rights activist." (Compl., -41).

Plaintiff was then taken to the Pender county jail in Burgaw. After being placed in a cell, defendant officer Doe I asked plaintiff for his social security number and place of birth. Plaintiff refused to give this information, and had a discussion with defendant Doe I about what he would put "if plaintiff were an illegal immigrant Mexican." (Compl.,-44). Defendant Doe IV then came and asked plaintiff the same questions, got the same response, and left. Defendant Doe II then came and had the "exact same conversation." (Compl.,-45). Defendant Doe I eventually became upset and stated "You keep on, and we will light you up." (Compl.,-46). Defendants took plaintiff's photograph, even though a photograph is not required or allowed for misdemeanor cases.

After about twenty more minutes, one of the officers came and told plaintiff that he could call his wife to come get him. She arrived about one hour later, and plaintiff was released without incident on the basis of a land deed. When filling out release papers, a different Magistrate asked plaintiff s wife to give a social security number, but plaintiff s wife declined. The Magistrate then skipped this section on the paperwork.

Plaintiff returned home. Plaintiff s briefcase, weapon, and car were returned to his possession, although he noticed that

bullets were missing from his gun. Also, the cashier's check allegedly in his car at the time of the arrest was not included at that time, but plaintiff was later reimbursed for this "lost" check. (Compl.,-65).

On April 29 ,2003, plaintiff pled not guilty to charges, including "Driving Without a License" before a judge in Pender County. (Compl., -72). After attending court, plaintiff went to the department to talk to defendant Smith. He met instead with defendant Hinkle and complained to him that his arrest was bogus. He claimed that his civil rights had been violated and stated that he would file a lawsuit. Hinkle told plaintiff to talk to the county prosecutor. Plaintiff repeated his complaints to the prosecutor, who told plaintiff that he would have to appear before a judge.

On May 27,2003, plaintiff appeared at the Pender County courthouse for his criminal trial. The prosecutor approached plaintiff and asked him "if he had gotten his North Carolina driver's license." (Compl., ~ 60). Plaintiff told the prosecutor he "was able to get one, knowing he was under the gun by the Department if he failed to do so and was seen 'driving' in Pender County." (Id.). The prosecutor told plaintiff that his charges were dropped.

Afterwards plaintiff went to the department and discussed with defendant Hinkle his desire to have the police department conduct an internal investigation to discipline those responsible and to prevent further similar injustices from happening in the future. Hinkle agreed to do conduct an internal audit. Hinkle also did a "police net" search in plaintiff's presence which showed that "Donald Raymond Sullivan was a resident of Chinook, Montana, and that his license had been permanently revoked." (Compl., ~ 62). Defendant Hinkle had no explanation for how defendant officers Reed, Gonzales and Wyrick could have acquired that information from a check of plaintiff s license. He stated that they must have searched the name "Donald Sullivan" and come up with a "Bingo." (Id.).

Defendants did not conduct an investigation or take disciplinary measures in the department, and plaintiff subsequently filed this lawsuit.

III. STANDARD OF REVIEW

The purpose of a motion to dismiss, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, is to test the sufficiency of the complaint, not to decide the merits of the action. Edwards v. City of Goldsboro, 178 F.3d 231,243-44 (1999). "[A] motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim." Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). At this stage of the litigation, the court must accept the well-pleaded allegations in the complaint as true and draw all reasonable factual inferences from those facts in the plaintiffs favor. Edwards, 178 F.3d at 244; Ibarra v. United States, 120 F.3d 472, 474 (4th Cir.1997). The court is not, however, required to accept as true the legal conclusions set forth in a plaintiffs complaint. Edwards, 178 F.3d at 244.

IV. DISCUSSION

A. Pender County as Improper Party

Defendants move to dismiss all claims against Pender County on grounds that, as a matter of law, the county has no control or supervisory power over the operational policies of the Sheriffs Department. In opposition, plaintiff argues that as a practical and factual matter the Sheriff s Department is controlled by funding from the County.

A county may only be held liable for acts for which the county has "final policymaking authority." City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988). Whether a county or county official has final policymaking authority in a specific area "is a question of state law," and "it is not a question of fact in the usual sense." Id. "[S]tate law ... will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." rd. at 125. "[A] federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." Id. at 126. Therefore, in this case, the policymaking authority of the county over Sheriffs

Department operations is an issue that may be resolved by looking to North Carolina law.

In North Carolina, the Office of Sheriff is a legal entity separate and distinct from the Board of County Commissioners. See N. C. GEN . STAT. § 162-1. The sheriff, not the county, has exclusive final policymaking authority over personnel matters, such as the supervision of the employees in his office. Clark v. Burke County, 117 N.C. App. 85,89 (1994); Peele v. Provident Mut. Life Ins. Co., 90 N.C. App. 447, 449-50 (1988); N.C. GEN. STAT. § 153A-103. Furthermore, the Sheriff has the sole statutory responsibility for the care and custody of detainees at the county jail. N. C. GEN. STAT. § 162-22. This authority may not be delegated to another person or entity. § 162-24.

Accordingly, in this case, plaintiff's claim that Pender County should be liable because it was responsible for the Sheriff s Department policies must be dismissed. Plaintiff has pointed to no authority under North Carolina law under which the county, as opposed to the Sheriff, would have final policymaking authority in overseeing the interactions between Sheriff s Department officers and citizens or detainees such as himself.

Accordingly, this part of the motion is ALLOWED and plaintiffs claims against Pender County are DISMISSED.

B. § 1985 and § 1986 Conspiracy Claims

Defendants move to dismiss plaintiff's conspiracy claims under § 1985 and § 1986. "The law is well settled that to establish a sufficient cause of action for 'conspiracy to deny equal protection of the laws' under section 1985(3)," and section 1986 by reference, a plaintiff must show that defendants were "motivated by a specific class-based, invidiously discriminatory animus." Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995); see 42 *V.S.C.* § 1985 & § 1986. "To meet the requirement of a class-based discriminatory animus, under this section the class must possess the discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex." Buschi v. Kirven, 775 F.2d 1240, 1257 (4th Cir. 1985); see Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) ("[T]here must be some

racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."). Beyond historical minority groups, "the class protected can extend no further than to those classes of persons who are, so far as the enforcement of their rights is concerned, 'in unprotected circumstances similar to those of the victims of Klan violence.'" Buschi, 775 F.2d at 1258 (quoting United Brotherhood of Carpenters v. Scott, 463 U.S. 825, 851 (1983)).

In this case, plaintiff's conspiracy claims plaintiff has failed to allege any class-based discriminatory animus on the part of defendants during the course of their investigation, arrest, interrogation and detention of plaintiff. Plaintiff, as a white, 55 year-old, male, military officer, landowner, and resident of Pender County, does not "possess the discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex." Buschi, 775 at 1257. If anything, plaintiff's emphasizes in his complaint that he was singled out because of his past conduct and views, and not because of discrete, insular, and immutable characteristics. For instance, he claims the actions of defendants "were retaliatory against Plaintiff because of his active campaigns against numerous parties of the local, state and federal governments ... in the pursuit of the protection of his, and others, private property rights." (Compl., ~ 75). Defendants "motive for these retaliatory acts was, in part, to destroy Plaintiff's political stature as a property rights activist and defender of the Constitution." (Compl., ~ 76; see also Compl., ~21). Accordingly, plaintiff's civil rights conspiracy claims under § 1985 and § 1986 fail as a matter of law. See Bowman v. Franklin, 980 F.2d 1104, 1109 (7th Cir. 1992) (holding that where landowners brought § 1983(3) claims, "[e]ven if the defendants' actions against [plaintiff] could somehow be viewed as political, § 1985(3) does not reach nonracial political conspiracies").

In opposition, plaintiff first argues that defendants have misread this class or race-based requirement into the law. This argument is without merit, as this court is bound by "well-established" precedent set by the Fourth Circuit and Supreme Court that class or race-based animus is a requirement for a § 1985 and § 1986 claim. See Simmons, 47 F.3d at 1376.

Plaintiff next argues that even if a race-based animus is required, his allegations that he was treated differently from an "illegal Mexican" show race-based animus. Plaintiff points out that defendants admitted that an "illegal immigrant Mexican" would not have to provide a social security number when interrogated. (PI's Br., p. 7, citing Compl., ~~ 44-49). This does not permit the inference, however, that such an illegal immigrant would be subject to more favorable arrest conduct or held in detention for a shorter time under similar charges and bail requirements imposed upon plaintiff. Much less does this show that defendants acted to arrest and detain plaintiff because he was in a class with millions of other American citizens who are not "illegal immigrant Mexicans." Accordingly, plaintiff has failed to sufficiently allege that the conduct of defendants was motivated by a class-based discriminatory animus.

Therefore, this part of the motion is ALLOWED, and Plaintiff's conspiracy claims under § 1985 and § 1986 are DISMISSED.

C. Official Capacity Claims

In the caption of his complaint, plaintiff names defendants Hinkle, Sloan, Wyrick, Reed, • Gonzales, and Does I-IV, individually and in his or her "capacity as" deputy or officer. (Compl. p. 1). Defendants argue that, insofar as plaintiffs complaint could be read as nominally asserting official capacity claims against these defendants, such official capacity claims should be dismissed as redundant of the official capacity claim against Sheriff Smith.

While personal-capacity suits seek to impose personal liability upon a government official, official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." Kentucky v. Graham, 473 U.S. 159, 165 (U.S. 1985) (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690, n. 55 (1978)). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." Id. at 166 (citing Brandon v. Holt, 469 U.S. 464,471-472 (1985)). "It is

not a suit against the official personally, for the real party in interest is the entity." Id. On this basis, many courts have dismissed official capacity claims against individual defendants where those claims are duplicative of official capacity claims against their employer. See ~ Thompson v. City of Arlington, 838 F.Supp. 1137, 1143 (N.D. Tex. 1993) (official capacity claim against individual defendants dismissed because city for whom they were employed was already a defendant in action); Marshall v. Ambridge, 798 F. Supp. 1187, 1198 (W.D.Pa. 1992) ("Because a claim against a municipal official in a official capacity is tantamount to a claim against the entity, it is not necessary to bring official capacity actions against local governmental officials.").

In this case, the official capacity claim against Sheriff Smith incorporates the official capacity claims against the individual deputies and officers. Therefore, the official capacity claims against the individual deputies and officers will be dismissed as redundant. To be clear, such a dismissal does not serve to dismiss the official capacity claim against Sheriff Smith, nor does it serve to dismiss § 1983 claims against any defendant in his or her individual capacity at this stage of the case.

Accordingly, this part of the motion is ALLOWED, and redundant official capacity claims asserted by plaintiff against the individual deputy and officer defendants are DISMISSED.

D. Motion to Dismiss by Defendant Helms

Defendant Helms, sued individually and in her capacity as a magistrate for the Fifth Judicial District for the State of North Carolina, moves the court to deem her motion to dismiss timely filed, on grounds of delay in service and excusable neglect. In her motion to dismiss she seeks dismissal, *inter alia*, on grounds of judicial immunity. Pursuant to Rule 12 of the Federal Rules of Civil Procedure, a defendant must serve a responsive pleading within 20 days after being served with the summons and complaint. FED. R. Crv.P. 12(a) & (b). In this case, defendant Helms was served on or about April 12, 2004. Defendant Helms filed her motion to dismiss on May 12, 2004, several days after the 20 day period time-period for response had expired. Pursuant to Rule 6(b), "the court for cause shown may at any time in its

discretion ... upon motion made after the expiration of the specified period permit [the response] where the failure to act was the result of excusable neglect." FED. R. Cry. P. 6(b)(2).

In this case, defendant Helms has established sufficient cause for filing her motion to dismiss several days late. In particular, upon service to defendant Helms at the Surf City Police Department on Apri112, 2004, the complaint was then forwarded to the North Carolina Administrative Office of the Courts where, by letter dated May 3, 2004, it was forwarded to the North Carolina Department of Justice to be assigned to an attorney to represent defendant. The complaint was received by the Criminal Division of the Department of Justice on May 10, 2004, and by counsel for defendant Helms on May 11,2004. Counsel filed the instant motion to dismiss one day later, on May 12, 2004. For good cause, on the basis of excusable neglect due to administrative delay, the court will permit defendant's motion to dismiss to be filed. Accordingly, the motion by defendant Helms to deem motion to dismiss timely filed is ALLOWED.

Defendant Helms moves to dismiss, *inter alia*, on grounds of judicial immunity. Judicial officers, including magistrates, "are not liable to civil actions for their judicial acts, even when such acts are ... alleged to have been done maliciously or corruptly." Stump v. Sparkman, 435 U.S. 349, 356 (1978); Pierson v. Ray, 386 U.S. 547,554 (1967); King v. Myers, 973 F.2d 354,356 (4th Cir. 1992) ("Magistrates are judicial officers, and are thus entitled to absolute immunity under the same conditions as are judges."). A judicial officer loses immunity only when she acts in the "clear absence of all jurisdiction over the subject-matter." Stump, 435 U.S. at 356 n.6 (emphasis added); King, 973 F.2d at 357.

In his complaint, plaintiff alleges that at all times relevant to the action defendant Helms was "an officer of the court for the Fifth Judicial District of North Carolina, and was acting under color of law as a magistrate for Defendant County." (Compl., ~ 15). Upon being arrested and taken to the police station, plaintiff "was brought before Magistrate Helms," who "charged Plaintiff criminally over his objections, and placed him under $1500.00 cash bond." (Compl., ~42). These actions by defendant Helms fall squarely within the jurisdiction of her judicial office. See N.C.

GEN. STAT. § 15A-511 (providing that person arrested without a warrant must be presented to a judicial officer, including a magistrate, for determination of probable cause); cf. King, 973 F.2d at 357-59 (finding that county magistrate who ordered a warrantless arrest using procedures not in accordance with statute was still conducting judicial act within subject matter jurisdiction of a magistrate). Therefore, defendant Helms is immune from suit for her actions alleged in the complaint.

Plaintiff argues that magistrate Helms' finding of probable cause was so biased and impartial that she should be held accountable for those acts. (PI's Br. p. 6). This argument is without merit, as neither bias nor corruption serves to extinguish a judge's absolute immunity to civil suit. Stump, 435 US. at 356. The proper recourse for a party who believes that the judge has ruled improperly, unfairly, or corruptly is to raise such errors when challenging the conviction, if any, that results from the charge on trial or appeal. See Pierson, 386 US. at 554.

Finally, plaintiff argues that judicial immunity should not apply because he is not only suing defendant Helms in her official capacity but also in her individual capacity for her "individual actions." (PI's Br., p. 6). This argument misconstrues the basis for absolute judicial immunity. In determining whether a defendant judge is immune from suit, the necessary inquiry "is whether at the time [she] took the challenged action [she] had jurisdiction over the subject matter before [her]." Stump, 435 US. at 356. For purposes of judicial immunity, "the scope of the judge's jurisdiction must be construed broadly." Id. "[F]actors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in [her] judicial capacity." Id. at 362. In this case, where plaintiffs allegations concern Magistrate Helms' imposition of a criminal charge and bail, defendant Helms' immunity is based upon the functional nature of these acts, not on whether she is sued in her individual or official capacity.

Therefore, on the basis of judicial immunity, defendant Helms' motion to dismiss is ALLOWED, and all claims against defendant Helms are DISMISSED.

CONCLUSION

For the foregoing reasons, the motion to dismiss part of plaintiff's complaint by the Pender County defendants (DE #6), is hereby GRANTED. Plaintiff's claims against defendant County of Pender are DISMISSED; Plaintiff's 42 U.S.C. § 1985 and § 1986 onspiracy claims against all defendants are DISMISSED; Plaintiff's official capacity claims under 42 U.S.C. § 1983 against defendants Hinkle, Sloan, Wyrick, Reed, Gonzales, and Does I-IV, are DISMISSED. The individual capacity claims brought by plaintiff against these defendants, and the individual and official capacity claims against defendant Smith, remain pending. In addition, the motion to dismiss, and motion to deem motion to dismiss timely filed, by defendant Dolores Helms, (DE#12), are hereby GRANTED.

Plaintiff's claims against defendant Helms are DISMISSED. All other claims asserted by plaintiff against defendants Smith, Hinkle, Sloan, Wyrick, Reed, Gonzales, and Does I-IV, remain pending .

SO ORDERED THIS THE 11TH DAY OF OCTOBER, 2004.

s/LOUISE W. FLANAGAN
Chief United States District Judge

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina

By _____
Deputy Clerk

APPENDIX B

Eastern District of North Carolina
United States District Court

LTC DONALD SULLIVAN, Plaintiff,

v.

Judgment in a Civil Case
Case Number: 7:04-CV-26-FL(1)

COUNTY OF PENDER, NORTH CAROLINA, et al., Defendants.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

It is therefore ORDERED, ADJUDGED, and DECREED that plaintiff's motion to amend the pleadings is DENIED. The motions for summary judgment by all defendants in this action are GRANTED. All claims raised by plaintiff are hereby DISMISSED. Accordingly, the clerk is directed to close the case.

SO ORDERED - s/Louise W. Flanagan, Chief District Court Judge, Eastern District of North Carolina.

This Judgment filed and entered on March 28. 2006 and copies mailed to:

LTC Donald Sullivan
P. O. Box 3061
Wilmington, NC 28406

Mark Allen Davis
Womble Caryle Sandridge & Rice
P. O. Box 831
Raleigh, NC 27602

MICHAEL D. BROOKS, ACTING CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:04-CV-26 FL(1)

LTC DONALD SULLIVAN, Plaintiff, Pro Se,	)	
	)	ORDER
v.	)	
COUNTY OF PENDER, NORTH CAROLINA, et al.,	)	
Defendants.	)	

This matter comes before the court pursuant to a motion for summary judgment by defendants Carson Smith ("Smith"), Keith D. Hinkle ("Hinkle), Mark Sloan ("Sloan") E.S. Wyrick, Jr. ("Wyrick"), Corey Reed ("Reed") and Sam Gonzales ("Gonzalez") (DE #43) and plaintiffs motion to amend or correct (DE #60). Plaintiff bas responded to defendants' motion (DE #68), and the Pender County defendants have replied (DE #69). Also, the Pender County defendants have responded to plaintiffs motion to amend or correct (DE # 61) and plaintiff has replied (DE #62).

In this posture, these matters are ripe for ruling. For the following reasons, the motion for summary judgment is granted and plaintiff's motion to amend or correct is denied.

I. STATEMENT OF THE CASE

In tbis action, plaintiff LTC Donald Sullivan seeks damages for violations of his constitutional and civil rights under 42 V.S.C. §§ 1983,1985, and 1986, and for common law assault and battery, false imprisonment, malicious prosecution, intentional infliction of emotional distress, defamation and gross negligence, in connection with an arrest. By Order of October 12, 2004, upon motion by the Pender County defendants, this court dismissed all claims against Pender County, the § 1985 and § 1986 claims against the individual defendants, the official capacity claims against the

individual defendants, excluding defendant Smith, and all claims against defendant Delores R. Helms.

The Pender County defendants filed the instant motion for summary judgment as to all remaining claims on July 1,2005. Plaintiff then filed a motion to dismiss defendants' motion for summary judgment on July 14,2005. By Order of November 14,2005 this court denied plaintiffs motion to dismiss defendants' motion for summary judgment, but granted plaintiff's motion for additional time in which to respond to such motion. Plaintiff filed his response to defendants' motion for summary judgment on December 5, 2005 and the Pender County defendants replied on December 9, 2005.

Plaintiff also filed a motion to amend the pleadings on September 16, 2005 to which the Pender County defendants responded on September 22, 2005. Plaintiff filed his reply on October 3, 2005. In his motion, plaintiff seeks to identify Defendants Doe I, II and IV and delete all references to Doe III. Plaintiff also seeks to add the phrase "and the right to liberty including, but not limited to, his right to travel" to three paragraphs of the complaint.

II. FACTUAL BACKGROUND

The allegations in plaintiffs complaint may be summarized as follows. At all times relevant to this case, plaintiff was a fifty-five year old, white, male, retired Lieutenant Colonel, landowner, and resident of Pender County, North Carolina. Defendant Smith was the Sheriff, and defendants Hinkle, Sloan, Reed, Gonzales, Wyrick, Doe I-IV, were officers or deputies in the Pender County Sheriffs Department (hereinafter "department"). Defendant Helms was a Magistrate in Pender County.

Over the course of several years plaintiff had various contacts and communications with the department. In 1999, plaintiff communicated with members of the department concerning land use on his property and issues relating to access through his property. Around this time, plaintiff also made a complaint to the

department concerning an allegedly unlawful confiscation of his personal weapon.

In December 2002, plaintiff met with defendant Sloan to discuss the department's investigation into his weapon complaint. Also at that meeting, defendant Sloan advised plaintiff that the department had received an anonymous tip that plaintiff did not have a valid driver's license. Plaintiff confirmed that he did not have a North Carolina driver's license, but showed defendant Sloan that he had a license for the state of Montana, valid until 2006.

In January 2003, plaintiff heard through an unidentified source that the department *was* trying to "get something on him" and was aware of "the driver's license issue." (CompI., ~2S). Plaintiff hand-delivered a letter addressing the issues raised by the unidentified source to the Sheriff, defendant Smith. Plaintiff met with defendant Smith, who read plaintiffs letter in his presence. Plaintiff confirmed with defendant Smith that he did not wish to obtain a North Carolina driver's license because the "NCDMV" was prone to putting private information on the Internet or selling it. (Comp!., 4jj 26).

At 2:00 P.M. on Aprill9, 2003, plaintiff was erecting a gate on his property at "Saps Road," in Hampstead, a town in Pender County_ (Comp!.,4jj27). The gate spanned the entrance to an access road to an alleged easement over plaintiff's property. Plaintiff had given the owner of the alleged easement a key to the gate. Defendant Reed arrived at the scene and told plaintiff that he could not put up the gate to restrict access to the alleged easement. After some discussion, plaintiff informed defendant Reed that he would not lock the gate until the next day.

At 5:30 p.m. that same day, defendant Sloan interviewed two individuals at a residence on the same road as plaintiffs property, in order to ascertain plaintiffs whereabouts. At around 7:00 p.m. that same day, plaintiff parked his car at a gas station in Hampstead, and was in the process of pumping gasoline. Defendants were aware that plaintiff was in Hampstead, and

plaintiff's car was readily identifiable by defendants. A department patrol car pulled into the gas station lot, and then pulled away. Several minutes later, three department patrol cars pulled into the gas station lot directly behind plaintiff s car. Defendant Reed exited the first car, defendant Wyrick exited the second, and defendant Gonzales exited the third.

Defendant Reed first inquired of plaintiff whether he had finished erecting his gate. Plaintiff responded that his gate was erected, but not locked. When plaintiff asked what was going on, defendant Reed responded that they would let him know. Defendant Wyrick asked to see plaintiff's driver's license. Plaintiff again asked what was going on, and defendant Gonzales "demanded he show the license, or else." (Compl., ~ 30). Plaintiff asked to be able to pay for his gas and move his vehicle away from the gas pumps. Defendant Gonzales informed plaintiff that they would take care of paying for the gas, and again asked plaintiff for his license.

Plaintiff then moved towards the interior of his car, stating that his license was located in a briefcase on the rear seat. Plaintiff retrieved a laminated license with an expired date from his briefcase, and also offered an "official update slip for the license to defendant Gonzales showing the license had been renewed." (Compl., ~ 31). Defendant Gonzales responded, "I don't need to see that. This (the laminated license) is all I need." (Id.). Defendant Gonzales also saw and retrieved a weapon on the front seat of plaintiff's car. Plaintiff was then searched and handcuffed tightly behind his back, so that the cuffs were painfully cutting into his wrists. Defendant Gonzales stated, "this license has been permanently revoked," to which plaintiff responded "that's news to me." (Compl., ~ 32). Plaintiffs car was searched thoroughly, a wrecker was called to impound the car, and plaintiff's weapon, briefcase, and a "cashier's check" in the car were seized. (Compl., ~ 38).

Plaintiff was taken to Wyrick's patrol car, where Wyrick asked him some background questions. Although plaintiff had renewal paperwork for his expired license, defendant Gonzales and

Wyrick did not want to look at plaintiffs paperwork or to "run the license" at the scene. Instead Gonzales and Wyrick referred to a previously-prepared" I 0-27 report" referencing the name "Donald Raymond Sullivan." (Compl., ~ 35). Plaintiff informed defendant Wyrick that his name was not Donald Raymond Sullivan, and stated "you have my license. You figure it out." (Compl., ~ 36). Defendant Wyrick contacted his dispatch, defendant Doe Ill, to verify plaintiff's name and determined that there was a discrepancy between the name on the 10-27 report and the name on the license. Defendant Wyrick also confirmed that the person referred to on the 10-27 report as Donald Raymond Sullivan was not plaintiff.

Defendant Wyrick asked for plaintiff's social security number and place of birth, which plaintiff refused to give. Plaintiff instead asked "what would he put down if it were an illegal immigrant Mexican in the car," to which Wyrick responded he would leave it blank. (Compl., ~37). Defendant Wyrick obtained a physical address from plaintiff, which plaintiff discovered later was made a matter of public record.

After "at least two hours" from the commencement of the stop, defendant Wyrick eventually began driving away from the gas station with plaintiff in the patrol car. (Campl., ~ 39). At one point, he abruptly pulled the car over and read plaintiff "his rights." (Id.). Plaintiff asked defendant Wyrick why they had stopped him, to which Wyrick responded "because I saw you driving.").

Defendant Wyrick drove plaintiff to the Surf City Police Station, where he was placed in a holding cell. He was then brought before Magistrate Helms, who charged plaintiff criminally. Plaintiff was placed under a $1500 cash bond, although Helms also told plaintiff that he could use a deed for bail once he had been registered at the jail. Helms volunteered that she was familiar with plaintiffs "stands against his neighbors and the government agencies." (Compl., ~ 42). All of the officers present also knew of plaintiff's reputation "as a property rights activist." (Compl., ~41).

Plaintiff was then taken to the Pender county jail in Burgaw. After being placed in a cell, defendant officer Doe I asked plaintiff for his social security number and place of birth. Plaintiff refused to give this information, and had a discussion with defendant Doe J about what he would put "if plaintiff were an illegal immigrant Mexican." (Compl., ~ 44). Defendant Doe IV then came and asked plaintiff the same questions, got the same response, and left. Defendant Doe JJ then carne and had the "exact same conversation." (Compl., ~ 45). Defendant Doe I eventually became upset and stated "You keep on, and we will light you up." (Comp!., ~ 46). Defendants took plaintiffs photograph, even though a photograph is not required or allowed for misdemeanor cases. After about twenty more minutes, one of the officers came and told plaintiff that he could call his wife to come get him. She arrived about one hour later, and plaintiff was released without incident on the basis of a land deed. When filling out release papers, a different Magistrate asked plaintiffs wife to give a social security number, but plaintiff's wife declined. The Magistrate then skipped this section on the paperwork.

Plaintiff returned home. Plaintiff's briefcase. weapon, and car were returned to his possession, although he noticed that bullets were missing from his gun. Also, the cashier's check allegedly in his car at the time of the arrest was not included at that time, but plaintiff was later reimbursed for this "lost" check. (Comp!., ~ 65).

On April 29, 2003, plaintiff pled not guilty to charges, including "Driving Without a License," before ajudge in Pender County. (Comp!., ~72). After attending court, plaintiff went to the department to talk to defendant Smith. He met instead with defendant Hinkle and complained to him that his
arrest was bogus. He claimed that his civil rights had been violated and stated that he would file a lawsuit. Hinkle told plaintiff to talk to the county prosecutor. Plaintiff repeated his complaints to the prosecutor, who told plaintiff that he would have to appear before a judge. On May 27, 2003, plaintiff appeared at the Pender County courthouse for his criminal trial. The prosecutor approached.

plaintiff and asked him "if he had gotten his North Carolina driver's license." (Compl., ~ 60). Plaintiff told the prosecutor he "was able to get one, knowing he was under the gun by the Department if he failed to do so and was seen 'driving' in Pender County." (Id.). The prosecutor told plaintiff that his charges were dropped.

Afterwards plaintiff went to the department and discussed with defendant Hinkle his desire to have the police department conduct an internal investigation to discipline those responsible and to prevent further similar injustices from happening in the future. Hinkle agreed to conduct an internal audit. Hinkle also did a "police nef' search in plaintiff's presence which showed that "Donald Raymond Sullivan was a resident of Chinook, Montana, and that his license had been permanently revoked." (Compl., ~ 62). Defendant Hinkle had no explanation for how defendant officers Reed, Gonzales and Wyrick could have acquired that information from a check of plaintiff s license. He stated that they must have searched the name "Donald Sullivan" and come up with a "Bingo". Defendants did not conduct an investigation or take disciplinary measures in the department, and plaintiff subsequently filed this lawsuit.

III. STANDARD OF REVIEW

Summary judgment is appropriate, under Rule 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIv. P. 56(c). A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party can meet this burden "by showing that there is an absence of evidence to support the nonmoving party's case." Honor v. Booz-AIlen & Hamilton. Inc., 383 F.3d 180, 185 (4th Cir. 2004). *"[A]* complete failure of proof concerning an essential element of [a

plaintiffs] case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323. Once the moving party has met its burden, the non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." Matsushita £lee. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (quoting FED. R. CIv. P. 56(e)).

In making a determination on a summary judgment motion, the court views the evidence in the light most favorable to the non-moving party, according that party the benefit of all reasonable inferences. Bailey v. Blue Cross & Blue Shield of Virginia, 67 F.3d 53, 56 (4th Cil. I 995). Nevertheless, judges are not "required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986) (citations omitted). "[C)onclusory statements, without specific evidentiary support," are insufficient to create a genuine issue of act. Causey v. Balo~, 162 F.3d 795, 802 (4th Cir.l998); see Thompson v. Potomac Elec. Power Co., 312 F.3d 645,649 (4th Cif. 2002) ("Conclusory or speculative allegations do not suffice"); Beale v. Hardy, 769 F.2d 213, 214 (4th Cil.1985) ("[M]ere speculation or the building of one inference upon another" is not sufficient); see also Stewart v. Prince George's County, 75 Fed. Appx. 198,203 (unpublished) (4th Cif. 2003) ("[T]he non-moving party may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful.") (quoting D'Amico v. City of New York, 132 F.3d 145, 149 (2d Cir.1998»; ContemDorarv Mission v. United States Postal Serv., 648 F.2d 97, 107 n.14 (2d Cir. 1981) ("An opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions.").

IV. DISCUSSION

A. Defendants Reed, Wyrick and Gonzalez -§ 1983 Claims

All defendants move for summary judgment on all claims against them. Specifically, defendants Reed, Wyrick and Gonzalez argue that, because plaintiffs arrest was supported by probable cause, plaintiffs § 1983 claim and his state law claims fail as a matter o flaw. In addition, defendants Reed, Wyrick and GonzaJez argue a defense of qualified immunity.

In his response, plaintiff contends that the facts presented show that defendants violated plaintiffs Constitutional rights by stopping, searching, confiscating a weapon and arresting plaintiff without probable cause. Rather, plaintiff asserts that his arrest was in retaliation for his filing a prior complaint against the Sheriff's Office (PI's Mem. in Opp. p. 7).

Given defendants Reed, Wyrick and Gonzalez assertion of a defense of qualified immunity, the court's analysis must proceed in two well-established steps. First the court must address a "threshold question: taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier v. Katz, 533 U.S. 194, 20 I (2001). If this first question is answered in the negative, the inquiry ends. If answered in the affirmative, the court must then proceed to consider whether defendant's conduct violated "clearly established" rights of which a reasonable officer would have known. Ld.

"The Fourth Amendment protects 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 125 S. Ct. 588, 593 (2004). In turn, probable cause to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person,

or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." United States v. Dickey-Bey,

393 F.3d 449,453 (4th Cir. 2004) (quoting Michigan v. DeFiJlippo, 443 U.S. 31, 37 (1979).

To determine the existence of probable cause, courts must examine "the totality of the circumstances known to the officer" leading up to the time of the arrest. Brown v. Gilmore, 278 F.3d 362, 367 (4th Cif. 2002). The court must "then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." Maryland v. Pringle, 540 U.S. 366,371 (2003) (citations omitted). Accordingly, "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." Devenpeck, 125 S. Ct. at 593.

"While probable cause demands more than a mere suspicion, evidence sufficient to convict is not required." Gomez v. Atkins, 296 F.3d 253,262 (4th eir. 2002) (citations omitted). "[T]he probable-cause standard is a 'practical, non-technical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Pringle, 540 U.S. at 370. Accordingly, "[finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision." Id. at 371 (quoting Illinois v. Gates, 462 U.S. 213,235 (1983)).

Further, a traffic stop is lawful if the officer has "a reasonable suspicion that criminal activity is afoot." United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004) (citing *Terry* v. Ohio, 392 U.S. **1,30** (1968». "Reasonable suspicion is a less demanding standard than probable cause." Alabama v. White, 496 U.S. 325, 330(1990). With these principles in mind, the court turns to an examination of whether, on the basis of the circumstances presented, defendants Wyrick, Reed and Gonzalez had reasonable suspicion to stop plaintiff, and further determine whether probable cause existed to arrest plaintiff for driving without a North Carolina Driver's License and displaying a fictitious and expired registration. Plaintiff admits in his deposition that although he believed he was not required to obtain a North Carolina Driver's License, he was

told by both defendants Sloan and Smith that the law required residents of the stateto obtain valid driver's licenses (PI. Dep. p. 45). Further, plaintiff admits that he placed a registration tag from another vehicle onto his Lincoln Town Car and proceeded to drive from his private property along a public roadway to the Wilco/Hess gas station in Hampstead. (PI. Mem. In Opp. p. 4). Defendant Sloan maintains that he informed his deputies to stop plaintiff if he was seen driving. (Def. Sloan Aff. ~ 4).

Based on these foregoing facts, and in accordance with the holdings of the Supreme Court, this court finds that defendant Reed's observance of plaintiff driving a motor vehicle on a public roadway, when having been previously informed by defendant Sloan that plaintiff did not possess a valid North Carolina driver's license, provided sufficient reasonable suspicion to conduct a stop of plaintiffs vehicle. Once stopped at the gas station, plaintiff was approached first by defendant Reed and subsequently by defendants Wyrick and Gonzalez. When asked to produce his driver's license, plaintiff produced only a Montana driver's license and when defendant Reed ran a license check on plaintiff's vehicle, he received information that the plate belonged to a different vehicle.

Plaintiff's failure to produce a valid North Carolina driver's license and his display of a fictitious, expired license plate provided ample probable cause for plaintiffs arrest, as both offenses are violations of the North Carolina General Statutes and provide for the arrest of those found in violation.

In his complaint and brief, plaintiff argues that his vehicle stop and arrest demonstrated elements o of prior planning on the part of the defendants. As evidence in support of this proposition, plaintiff notes that, defendants were in possession of a "(0-27 report" showing defendant's Montana driver's license had been revoked and that "upon information and belief, [the report] was of the preprinted variety, and the defendants had it in their possession prior to the stop" (Compl. ~ 35).

Plaintiffs argument is flawed in several respects. First, even taking as true plaintiffs allegation that defendants had subjective intent to arrest plaintiff without probable cause, this fact is irrelevant to the

constitutional Fourth Amendment inquiry. The Supreme Court's "cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." Willen v. United States, 517 U.S. 806, 813 (1996). Even "subjectively bad intentions on the part of the individual officer will not make a constitutional violation out of an otherwise reasonable seizure." Martin v. Gentile, 849 F.2d 863, 869 (4th Cir. 1988). Accordingly, the thought processes of defendants Wyrick, Reed and Gonzalez in justifying the arrest, or their own understanding of the evidence required to support probable cause, are irrelevant to the court's inquiry.

In summary, where the undisputed evidence concerning the totality of the circumstances is sufficient to establish a basis for probable cause, plaintiff's Fourth Amendment claim against defendants Wyrick, Reed and Gonzalez fails.

Finally, although the court finds plaintiff's Fourth Amendment claim lacking in merit, in the alternative, the court also finds that qualified immunity forecloses liability against these defendants. Qualified immunity protects government officials performing discretionary functions from liability for civil damages to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In this case, where plaintiff failed to produce a valid North Carolina driver's license and displayed a fictitious and expired registration, this court finds that defendants reasonably could conclude that probable cause existed to arrest plaintiff for violations of various North Carolina General Statutes, Accordingly, qualified immunity protects defendants Wyrick, Reed and Gonzalez from liability for any Fourth Amendment violation arising therefrom.

Therefore, as it relates to plaintiff's § 1983 claims against defendants Wyrick, Reed and Gonzalez, stemming from the stop, search and arrest of plaintiff, defendants motion for summary judgment is granted.

B. § 1983 Claims - Defendants Sloan and Hinkle

To establish individual liability in a §1983 action, plaintiff must show that the defendant officers had personal involvement in the alleged deprivation of plaintiff's rights. Wright v. CoJlins, 766 F.2d 841, 850 (4th Cir. 1985); Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977); De Ventura v. Keith, 169 F. Supp. 2d 390, 395 (D. Md. 2001). Apart from supervisory or bystander liability, a non-supervisory police officer's personal involvement may be shown through direct participation in, or direction of, unconstitutional conduct. See~, De Ventura, 169 F. Supp. 2d at 395; Richardson v. Snow, 340 F. Supp. 1261,1262 (D. Md. 1972). In this case, as noted before, defendants Sloan and Hinkle did not directly participate in the stop or arrest of plaintiff. Although defendant Sloan directed deputies to stop plaintiff should they see him driving on public roads without a valid driver's license, such order, to enforce the laws of the State of North Carolina, cannot be viewed as direction to violate the constitutional rights of plaintiff. Based on the foregoing, defendants' motion for summary judgment as it relates to plaintiff's § 1983 claim against defendant Hinkle, is granted.

C. § 1983 Claims-Defendants Smith in his Individual Capacity

It is undisputed that defendant Smith did not personally participate in the pursuit, stop and arrest of plaintiff. Rather, defendant Smith's alleged involvement carne only months after plaintiff's arrest when plaintiff requested a meeting with defendant Smith to discuss plaintiffs complaint. The Fourth Circuit has set forth three elements necessary to establish supervisory liability under § 1983:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff;
>
> (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices,' and
>
> (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994).

In this case, plaintiffs supervisory liability claim is without merit because he has failed to bring forth evidence showing knowledge of "a pervasive and unreasonable risk" of constitutional injury. Id. "Establishing a 'pervasive' and 'unreasonable' risk often requires evidence that the conduct is widespread, or at least has been used on several different occasions and that the conduct engaged in by the subordinate poses an unreasonable risk of harm of constitutional injury." rd.; see also Wellington v. Daniels, 717 F.2d 932,936 (4th Cir. 1983) (supervisory liability requires "a history of widespread abuse.").

The evidence presented by plaintiff fails to meet this standard. Here, it is undisputed that defendant Smith was aware that plaintiff did not possess a valid North Carolina driver's license, inasmuch as defendant Smith discussed the issue with plaintiff, and informed plaintiff that he needed to obtain a license. (Plf. Dep. p. 45). It is also undisputed that at the time of plaintiffs stop by defendants Wyrick, Reed and Gonzalez he had not yet obtained a North Carolina driver's license, due to plaintiffs own admission and his further contention that he did not need one. As the court discussed previously herein, plaintiffs failure to possess a valid North Carolina driver's license, coupled with his expired and fictitious license plate provides sufficient probable cause to arrest plaintiff. Accordingly, where the presence of probable cause precludes a Fourth Amendment violation, defendant Smith did not have actual or constructive knowledge of a "pervasive and unreasonable risk" of unconstitutional behavior on the part of his subordinates arising from plaintiff's arrest.

Additionally, plaintiff presents no evidence to the court to satisfy the requirement in the Shaw test that "the conduct is widespread, or at least has been used on several different occasions," see Shaw, 13 F.3d at 799. Accordingly, pursuant to Shaw v. Stroud, the court is compelled to grant defendants' motion for summary judgment relating to § 1983 supervisory liability claims against defendant Smith.

D. §1983 Claims - Defendant Smith in his Official Capacity

Plaintiff asserts a claim under § 1983 against defendant Smith in his official capacity. Such claim actually constitutes a claim against the entity, here the Pender County Sheriffs Department. See Gantt v. Whitaker, 203 F.Supp.2d 503, 508 (M.D.N.C.2002), affd, 57 Fed.Appx. 141 (4th Cir.2003). Plaintiff alleges a failure to train deputies properly and a failure to implement policies and procedures to ensure that constitutional rights violations such as those alleged by plaintiff would not occur. (Compl. ~ 93). Defendants contend that plaintiff's claims against defendant Smith in his official capacity fail as a matter of law as plaintiff is unable to show that his constitutional rights were in fact violated. (Def. Mem. pp. 22-23).

A sheriffs department, through a claim against one of its employees in their official capacity, may be liable for the failure to train its employees only where such failure "reflects 'deliberate indifference' to the rights of its citizens." Doe v. Broderick, 225 F.3d 440,456 (4th Cir.2000) (quoting City of Canton v. Harris, 489 U.S. 378, 388, (1989)). Deliberate indifference may be found where "'in light of the duties assigned to specific officers or employees, the need for more or different training is ... obvious, and the [failure to train is] likely to result in the violation of constitutional rights.'" Jordan by Jordan v. Jackson, 15 F.3d 333, 341 (4th Cir.1994) (quoting City of Canton, supra, at 390). The Supreme Court has held that" 'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Bd. of County Comm'rs v. Brown, 520 U.S. 397,410 (1997). Under a § 1983 claim, a plaintiff must also show that the failure to train reflects a policy or custom of, or a conscious decision by, the municipality. Id. Mere negligence in the failure to train will not suffice to impose § 1983 liability. Id. Plaintiff must also show the deficiency in training to be the cause-in-fact of the deprivation of rights alleged. Id.

Additionally, a sheriffs department, through a claim against one of its employees in his official capacity, may also be liable under § 1983 for a failure to implement proper policies and procedures. However, liability will only lie where the policy has a

" specific deficiency ... such as to make the specific violation almost bound to happen, sooner or later, rather than merely likely to happen in the long run.' "Carter v. Morris, 164 F.3d 215, 218 (4th Cir.1999) (quoting Spell v. McDaniel, 824 F.2d 1380, 1390 (4th Cir.1987)). The failure to implement policies must also be the "moving force" of the Plaintiffs injuries. Monell v. De])'t of Social Serv. of City of New York, 436 U.S. 658, 694 (1978).

In this case, as noted herein by the court, plaintiff has failed to establish that his constitutional rights were in fact violated. Plaintiff has also failed to set forth any evidence to support his contention that defendant Smith failed to properly train his subordinate officers or that policies were in place, which were likely to cause violations of any person's constitutional rights. Therefore, plaintiffs claim against defendant Smith in his official capacity fails, and summary judgment is hereby granted.

E. Assault and Battery Claim

Apart from the discussion of plaintiffs Fourth Amendment claims, plaintiff argues in support of an assault and battery claim by pointing out that defendant Wyrick, Reed and Gonzalez made offensive contact with plaintiffs person that was non-consensual and subsequent to an unlawful arrest. (Compl. '1 104-105). Plaintiff also contends that defendants Smith and Hinkle had personal knowledge of the events surrounding plaintiffs arrest and had the duty to prevent violations of the law. (Compl. ~ 106). Nevertheless, given the court's ruling on plaintiffs Fourth Amendment claim and the issue of probable cause, plaintiffs assault and battery claim must also fail. See N.C. Gen. Stat. § 15A-40 1 (d)(l)(a) (privileging use of force by a police officer reasonably necessary "to effect an arrest of a person who he reasonably believes has committed a criminal offense"); Glenn-Robinson v. Acker, 140 N.C. App. 606, 625 (2000) ("If Acker did not have probable cause to arrest plaintiff, Acker loses the benefit of O.S. § I 5A-40 I (d), and any use of force becomes at least a technical assault and battery against plaintiff. ").

Next, plaintiff appears to suggest also that, even if his arrest was lawful, the force used to effectuate the arrest was excessive. "[A]ll claims that law enforcement officers have used excessive force ... in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." Graham v. Connor, 490 U.S. 386, 395 (1989). In particular, Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Graham, 490 U.S. at 396 (internal citations omitted). In this case, the undisputed evidence shows that plaintiff was handcuffed and placed into the back seat of the patrol car after his arrest. (Comp!~ 104-105; PI's Mem. in Opp. p. 6). Although plaintiff alleges that he was uncomfortable due to the "cramped quarters in the back seat of that patrol car, coupled with the painfully tight handcuffs behind his back, and the seat belt strapped across his lap", he presents no medical evidence to the court of any injury resulting there from. In any event, the use of handcuffs, without more, is insufficient to rise to the level of excessive force. See Carter v. Morris, 164 F.3d 2 15,219 nJ (4th Cir.1999) ("Carter's basis for her excessive force claim - that her handcuffs were too tight and that an officer pushed her legs as she got into the police car - is so insubstantial that it cannot as a matter of law support her claim under ... the Fourth Amendment.") (citing Martin v. Gentile, 849 F.2d 863, 868-69 (4th Cir. 1988)).

Moreover, concerning plaintiffs claims against defendants Smith and Hinkle for failure to restrain subordinate officers from violating the law, these claims must also fail. As noted herein by the court, defendants Wyrick, Reed and Gonzalez committed no violations of law by restraining plaintiff in handcuffs pursuant to lawful arrest, therefore, no liability may be imparted to their superior officers, defendants Hinkle and Smith.

In sum, summary judgment is hereby granted in favor of all defendants on the claim of assault and battery.

F. False Imprisonment

Plaintiff next alleges that he was falsely imprisoned by defendants Wyrick, Reed and Gonzelez in that plaintiff was "placed in handcuffs and compelled to remain in defendant Wyrick's patrol car where he did not wish to remain." (Compl. ~ 109). Defendants move for summary judgment on this claim, arguing plaintiff cannot show the required elements of the offense. (Def. Mem pp 9-12). Under North Carolina law, to prevail on a claim of false imprisonment, a plaintiff must show: (1) the illegal restraint of plaintiff by defendant; (2) by force or threat of force; and (3) against the plaintiff's will. See Fowler v. Valencourt, 334 N.C. 345,435 S.E.2d 530 (1993).

As discussed herein by the court, sufficient probable cause existed to place plaintiff under arrest for driving without a valid North Carolina driver's license as well as the display of a fictitious and expired registration. Therefore, plaintiff cannot show that his restraint was illegal and cannot prevail on his false imprisonment claim as he fails to present evidence sufficient to fulfill the elements of the offense as outlined by the North Carolina Supreme Court.

Defendants' motion for summary judgment on this claim is granted.

G. Malicious Prosecution

Plaintiff contends that defendants Wyrick, Reed, Gonzalez, Sloan, Smith and Hinkle allowed a criminal proceeding against plaintiff to proceed without probable cause. (Compl ~ 114). Defendants counter by arguing that probable cause existed to arrest plaintiff and that plaintiff cannot prove that the officers acted with malice in their arrest of plaintiff and, therefore, plaintiffs claim of malicious prosecution must fail. (PI. Mem. pp. 12-14).

Under North Carolina law, to prevail on a malicious prosecution claim, a plaintiff must show; (1) that the defendants initiated the proceeding; (2) that they did so maliciously; (3) without probable cause; and that (4) the proceeding terminated in plaintiffs favor. Jones v. Gwynne, 312 N.C. 393, 323 S.E.2d 9, 11 (1984). Lack of probable cause is an essential element of malicious prosecution and the burden of proving lack of probable cause is on the plaintiff. Priddy v. Cook's United Dep't Store, 17 N.C.App. 322, 194 S.E.2d 58 (1973); Flippo v. Hayes, 98 N.C.App. 5,389 S.E.2d 613 (1990).

Here, plaintiff cannot show lack of probable cause. As discussed above, this court has determined sufficient probable cause existed to arrest plaintiff for driving without a valid North Carolina driver's license and display of fictitious and expired registration.

Plaintiff argues the charge against him for driving without a valid North Carolina driver's license was dropped by the district attorney and that such evidence is adequate to prove that no probable cause existed for his arrest. (Compl. ~ 116). However, as admitted by plaintiff in his own complaint, he obtained a valid North Carolina driver's license and presented the same to the court causing the dismissal of charges. (Compl. ~ 116). This court finds that such subsequent compliance by plaintiff, does not negate the court's earlier finding of the existence of probable cause at the time of plaintiff s arrest.

Further, as noted in affidavit by Assistant District Attorney Dru Lewis, the fact that the charges against plaintiff were dropped is evidence only of the existing policy of the District Attorney's office such that subsequent compliance, like that of plaintiff, allows voluntary dismissal of pending charges. Likewise, such dismissal is not evidence of a lack of probable cause and as earlier determined by this court, sufficient probable cause existed to support plaintiffs arrest.

Therefore, as plaintiff has failed to present evidence sufficient to sustain his claim of malicious prosecution, defendants'

motion for summary judgment on such claim is granted.

H. Intentional Infliction of Severe Emotional Distress

Plaintiff also claims that the events surrounding his arrest support a claim of intentional infliction of severe emotional distress (Com pI ~ 119-123). To support a claim for intentional infliction of emotional distress under North Carolina law, a plaintiff must show that defendants engaged in (I) extreme and outrageous conduct, (2) which was intended to cause and did cause (3) severe emotional distress. Hog.an v. Forsyth Country Club, 79 N.C. App. 483, 340 S.E.2d 116 (1986); Hartsell v. Duplex Products. Inc., 123 F .3d 766, 774 (4th Cir. 1997); Jackson v. Kimel, 992 F .2d 1318, 1324 (4th Cir. 1993). Plaintiff presents as evidence of outrageous conduct the fact that his arrest was made in a public place and was without probable cause.

"Extreme and outrageous conduct" is a classification reserved for acts which "shock the conscience" or amount to conduct "intolerable in decent society." See West v. King's Dept. Store, 321 N.C. 698, 365 S.E.2d 325 (1981). As previously noted, this court has determined that plaintiffs arrest was supported by probable cause and further finds that public arrest does not rise to the level of conduct sufficient to shock the conscience. Therefore, plaintiff has failed to satisfy the first element of the claim.

Further, plaintiff has not brought forth specific evidence to fulfill the third element of this claim. In North Carolina, to fulfill the element of severe emotional distress, plaintiff must present evidence linking defendant's conduct to a "severe and disabling emotional or mental condition." Waddle v. Sparks, 331 N.C. 73, 83 (1992). Although plaintiff alleges in his complaint that he suffers from "chronic depression, a permanent sense of foreboding, apprehension and persecution" he has presented no medical evidence to support such contentions. (Compl. 1122). Therefore, plaintiff has failed to present evidence sufficient to sustain his claim of intentional infliction of severe emotional distress and defendants' motion for summary judgment on this claim is granted.

I. Defamation

Plaintiff also asserts a claim of defamation against defendants Wyrick, Reed, Gonzalez, Smith and Hinkle. Plaintiff contends that these defendants caused a "Release Order" to be distributed when no evidence supported the charges against plaintiff and that such statement was further released to the District Attorney's office and made a matter of public record. (Compl.' 125). However, in his deposition, plaintiff presented that there was not in fact a specific written or verbal statement that he alleged to be defamatory, but rather, the act of his arrest itself provides the basis for this claim. (PI. Dep. pp. 81-82).

A claim for defamation requires that a plaintiff allege and prove that the defendants "made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiffs reputation." Smith-Privev. Charter Behavioral Heahh Sys., 164 N.C. App. 349, 355 595 S.E.2d 778, 784 (2004). In a defamation suit, "[t]he words attributed to defendant [must] be alleged 'substantially' *in haec verba,* or with sufficient particularity to enable the court to determine whether the statement was defamatory." Stuftts v. Duke Power Co., 47 N.C. App. 76, 83, 266 S.E.2d 861, 866 (1980).

Plaintiffs claim, therefore fails as a matter of law. If plaintiffs claim is based upon the "Release Order" as alleged in his complaint, plaintiffs claim fails because such statement was not false. Plaintiff had in fact been charged and released and as noted previously herein, plaintiffs charge was supported by probable cause. Further, if plaintiff s allegation of defamation is based upon the act of his arrest as noted in his deposition, his claim will fail as well. As provided by the North Carolina Court of Appeals, in order to sustain a claim of defamation, there must be a statement or words spoken such that the court may make an appropriate determination as to whether the statement was in fact defamatory. Therefore, because plaintiff can prove neither that his claim is predicated upon a statement that is false or conversely, a statement at all, his claim must fail. Defendants' motion for summary judgment on the claim of defamation is hereby granted.

I. **Gross Negligence**

In plaintiffs next claim he alleges that defendants Smith, Sloan and Hinkle were grossly negligent in their hiring, training and supervision, as well as their failure to prevent subordinate officers from making an arrest not supported by probable cause. (Compl. ~ 131). Additionally, plaintiff contends that defendants Smith, Sloan, Hinkle, Wyrick, Reed and Gonzalez were all grossly negligent in their actions pertaining to the stop and arrest of plaintiff. (Compl ~ 134). Finally, plaintiff asserts that defendant Smith was grossly negligent in his failure to establish proper and adequate guidelines and training for his subordinate officers. (Campl. ~ 135).

North Carolina defines gross negligence as an action done with "'conscious or reckless disregard for the rights and safety of others.'" Yanceyv. Lea, 354N.C. 48, 52, 550 S.E.2d 155, 157 (2001)(quoting Bullinsv. Schmidt, 322N.C. 580,583,369 S.E.2d 601, 603 (1988». The difference between negligence and gross negligence "is not in degree or magnitude of inadvertence or carelessness, but rather is intentional wrongdoing or deliberate misconduct affecting the safety of others." Id. at 53.

As previously discussed here, plaintiff's arrest was supported by probable cause and plaintiff has failed to present evidence sufficient to sustain a claim that defendant Smith failed to properly train or supervise or that any of the named defendants committed tortuous behavior toward plaintiff. As plaintiffs claim of gross negligence is based solely upon those actions previously discussed herein, and inasmuch as all actions undertaken by defendants as well as plaintiffs arrest were all found permissible, this court finds that plaintiff has failed to present evidence sufficient to maintain a claim of gross negligence as he has failed to prove that any of the defendants engaged in any wrongdoing, intentional or otherwise. Therefore, defendant's motion for summary judgment on the claim of gross negligence is granted.

J. Lack of Jurisdiction

Plaintiffs final claim stems from his assertion that defendants lacked jurisdiction to enter the gas station to effectuate

his stop and arrest, as he contends such property is private and outside the jurisdiction of the Sheriff. It appears from all the evidence that the premises of the gas station was in fact a public place. Yet, even assuming *arguendo* that plaintiff s contention is correct and the gas station is in fact private property, plaintiff's argument fails. A police officer may enter either public or private property in order to investigate or prevent a crime. State v. Wray, 217 N.C. 167.7 S.E.2d 468 (1940).

In this case, plaintiff maintains that he was already parked at the gas station when defendant Reed pulled into the parking lot and approached plaintiff, requesting his license. (PI. Mem in Opp. p. 4). The fact that defendant Reed observed plaintiff driving on the public roads of the state with reliable information that plaintiff did not possess a valid driver's license provides a sufficient basis upon which defendant Reed could rely to enter the private property of the gas station to investigate the possible commission of a crime, namely, plaintiff's operation of a vehicle without a valid North Carolina driver's license by plaintiff. Therefore, in accordance with the holdings of the North Carolina Supreme Court, this court finds that defendants acted within their appropriate jurisdiction by effectuating the arrest of plaintiff on the property of the Wilco/Hess gas station, whether it be deemed public or private.

K. Motion to Amend

Pursuant to motion filed September 16, 2005, plaintiff seeks leave to amend his complaint to replace defendant John Doe I with defendant Stedman Hall, defendant John Doe II with defendant Marvin Morgan, defendant Jane Doe and John Doe IV with Tanika Lipford and delete all reference to defendant John Doe III. Plaintiff also seeks to add the phrase "and the right to liberty including, but not limited to, his right to travel" in three places. Defendants respond and ask the court to deny such motion in that plaintiffs request to amend the pleadings is in violation of the court's Case Management Order in this case where such Order provided that all motions to amend the pleadings were to be filed by December 15, 2004. Plaintiff replies and contends that his delay

in filing is due to defendants untimely response to his request for discovery and that the names of the additional parties was not received until September 2, 2005.

Defendants are correct in that the Case Management Order issued by the court in this case provides that all motions to amend the pleadings shall be filed by December 15,2004. Additionally, this order provides instruction to all parties on the procedure to filing motions to compel the production of discovery. Therefore, should plaintiff have experienced undue delay in the receipt of requested discovery information from defendants, he was in the possession, and therefore accorded knowledge of, the process by which to seek remedy from this court. Additionally, the Order provides that the deadlines set forth therein are binding on the parties and that it shall not be modified except for leave of court upon showing of good cause. According to this court's docket, plaintiff has at no time sought extension of the deadline to amend the pleadings as provided in the Case Management Order. Accordingly, this court finds that plaintiff's motion to amend is not timely and is hereby denied.

CONCLUSION

Based upon the foregoing, plaintiff's motion to amend the pleadings is DENIED. The motions for summary judgment by all defendants in this action are GRANTED. All claims raised by plaintiff are hereby DISMISSED. Accordingly, the clerk is directed to close the case.

SO ORDERED, this 28th day of March 2006.

LOUISE W. FLANAGAN
Chief United States District Judge

APPENDIX C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1497

DONALD SULLIVAN
Plaintiff - Appellant,

versus

CARSON SMITH, et al,
Defendants-Appellees

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Louuise W. Flanagan, Chief District judge. (7:04-00026-FL)

Submitted: December 21, 2006[sic] Decided: December 28, 2006

Before NIEMEYER, WILLIAMS, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Donald Sullivan appeals the district court's order denying relief on his 42 U.S.C., Section 1983, (2000) complaint. We have

reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Sullivan v. Smith, No. 7:04-cv-00026-FL (E.D.N.C. Mar. 28, 2006). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED